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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1261

WARD HOLT, *Petitioner*

vs.

TEXAS-NEW MEXICO PIPELINE COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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To the Honorable Harlan F. Stone, Chief Justice of the Supreme Court of the United States, and the Honorable Associate Justices of the Supreme Court of the United States:

Your Petitioner, Ward Holt, respectfully prays for the issuance of a Writ of Certiorari to the Circuit Court of Appeals for the Fifth Circuit, to review the judgment of that Court entered on December 8, 1944, pursuant to an opinion of the Court (145 F. (2) 862), motion of petitioner for a rehearing denied on January 13, 1945, in a case numbered and entitled on its docket "No. 10838, Ward Holt, Appellant, v. Texas-New Mexico Pipeline Company, Appellee." Thereby said Court affirmed a judgment of the United States District Court for the Western District of Texas, in favor of the Defendants in the District Court, granting the defendant a preemptory instruction.

The certified transcript of the record in the case,

including the proceedings in the said Circuit Court of Appeals is presented herewith in accordance with Rule 38 of this Court.

I.

Summary Statement of Matter Involved

The Circuit Court's opinion is incorrect in the following particulars. We know of no better method of calling the attention of this Honorable Court to said errors than to quote from our Motion for Rehearing as filed before the Circuit Court as follows:

"Appellant herein moves the Court to grant him a rehearing upon the action of this Court as shown by its opinion and judgment herein of December 8, 1944, wherein the judgment of the lower court is affirmed; and in this connection appellant respectfully shows unto the Court that a Rehearing should be granted and the judgment of the trial court reversed and remanded on account of the errors hereinafter assigned and specified, being to-wit:

1.

This Honorable Court erred and makes an incorrect statement when it says that Appellant contended for a reversal under only two well settled legal principles. It is true that in our main brief we devoted more time to these two well settled principles, *but in our statement of Points Relied upon in this Appeal, together with our Supplemental Brief filed by the permission of this Honorable Court, as well as our Rejoinder, we thoroughly discussed two other well settled legal prin-*

ciples and that is that (a) That an employer of an independent contractor is liable for a negligent order which proximately causes an invitee's injuries when such order is given within the scope of his employment by his employee, and (b) that the evidence in this case, raises the issue of constructive knowledge of the presence of the dynamite on the Appellee's premises; and that hence it was a question for the jury as to whether or not Appellee should have discovered and removed the dynamite from their premises.

We now earnestly request this Honorable Court to discuss these two propositions of law so that some disposition may be made of same in this hearing. We refer this Honorable Court to the authorities cited not only in our Rejoinder, but also in our Supplemental Argument filed by permission of this Honorable Court after oral argument had been had in this cause, for the evidence and authorities fully sustaining our position as to these two principles of law which have not been discussed by this Honorable Court in the opinion.

Statement

We here set out Appellant's First Point together with our Sixth Point:

1.

The Honorable Trial Court erred in sustaining the motion of the defendant, Texas-New Mexico Pipeline Company, for an instructed verdict upon the ground that the uncontroverted testimony showed that the plaintiff was injured solely by the negligence of his employer in failing to discover and remove the un-

exploded dynamite charge since in this case the evidence showed that Tony Hudler, as inspector for the Texas-New Mexico Pipeline Company, negligently directed the plaintiff by giving instructions to plaintiff's straw boss, John Rush, *and to the crew in which plaintiff was working to go back down the line and to dig out some bumps when at* the time of giving said instructions, four or five unexploded sticks of dynamite had been negligently permitted to exist on the premises of the defendant for a period of some 24 hours. (R. pp. 156-157.)

6.

The Honorable Trial Court erred in sustaining the motion of the defendant, Texas-New Mexico Pipeline Company, for an instructed verdict upon the ground that the evidence failed to show that Tony Hudler knew of the unexploded charges of dynamite since in the case the test is whether or not Tony Hudler in the exercise of the care required by those dealing with highly dangerous explosives such as dynamite, should have discovered the presence of said unexploded charges and in this case the evidence showed that unexploded charges of dynamite remained on the premises of the defendant for more than 24 hours prior to the time of plaintiff's injuries.

This evidence, in and of itself, is sufficient to submit to the jury the question of whether the defendant should have discovered said dynamite and warned plaintiff or removed same. (R. p. 159.)

2.

This Honorable Court erred in holding on page two of the opinion: "Tony Hudler, a welding inspector employed by the company to see that the work met with the specifications of the contract, came up to the group and told the straw boss that there were some humps or irregularities in the rock section of the ditch that would have to be dug out."

Statement

The above statement is incorrect since the order as viewed most favorably to the Appellant is set out on pages 1 and 2 of our Supplemental Argument on file in this cause and said order appears on pages 41, 42 of the Record in this cause, showing that the witness Perkins testified (Perkins being a fellow servant of the Appellant) that Hudler sent the Appellant back "and there was five of us that was sent back over there to dig down those places."

3.

This Honorable Court erred in holding on page three of the opinion "the existence of the danger was unknown to the company."

Statement

The following appears from the Statement (R. pp. 134-135):

"Q. Those other inspectors did not stay out there very much, did they?

"A. Well, there was one of them that was out

there pretty well all the time.

"Q. Who was that?

"A. Enlow I believe was his name.

"Q. How long did he stay there, on the average?

"A. He was out there nearly all day. He had two jobs to look over. He was more or less looking after the doping and also looking after the pipe as it was strung in there, to see there was no bad pipe. It was an old reconditioned line, and they was trying to cut the bad pipe before it was lined up and welded.

"Q. Where was Mr. Koepps,—he was the other inspector on the job?

"A. I don't know. I believe he was over the hill there at the time of the explosion.

"Q. He was there at the time of the explosion?

"A. He was over there where I was.

"Q. He lives in Eunice, New Mexico, doesn't he?

"A. I don't know where he lives.

"Q. At that time he was district engineer for the Texas-New Mexico Pipe Line Company, and still is, isn't he?

"A. Well, I don't know what his title was, to be frank with you.

"Q. He was with the Texas-New Mexico Pipeline Company in an official capacity?

"A. Yes, sir.

"Q. And you don't know whether Mr. Koepps is still with the Texas-New Mexico Pipeline Company or not?

"A. Well, I don't know; I couldn't say.

"Q. Have you seen him here today?

"A. Yes, sir.

"Q. He is here today?

"A. Yes, sir.

"Q. He was there at the time of the explosion?

"A. He was over the hill where I was working with the welders.

"Q. Did he stay out there half the time or not?

"A. Some days he would be out there all the time; some days he was called off to look after other work, and be gone for a day.

"Q. Sometimes they would both be gone, and you would do it by yourself?

"A. I don't believe there was any time I was by myself altogether, that would be along on that part of the ditch."

In the case of *Apex Construction Company v. Farrow*, 71 SW (2) on page 325, the court said:

"Appellants did not produce either of the employees charged with the custody or possession and use of the dynamite caps. Nor did they produce the watchman who guarded the property at the camp site where the dynamite caps were seen by the Richardsons within a few minutes after it had been abandoned and while the camping outfit was still in sight, and later found by the deceased boy and others in the ground and scattered about upon the ground at and around the camp site. This evidence was sufficient to show that Appellants, their agents, servants, and employees negligently left the dynamite caps at the abandoned camp site where the child found them and picked them up and was killed by their explosion in his hands. Especially is this true since appellants

failed to produce or account for the absence of their employees charged with the care, custody or possession of the dynamite caps, and from which failure the jury had the right to infer that the said employees' evidence would have been against appellants under the rule that 'The failure of a party to produce evidence which is within his knowledge, which he has the power to produce, and which he would naturally produce if it were favorable to him, gives rise to an inference that if such evidence were produced, it would be unfavorable to him.' 22 C. J. 111. Or 'such an unfavorable presumption may arise, for example, from the failure of a party to produce testimony peculiarly within his knowledge, or his failure to call witnesses who have knowledge of the facts, especially his own agents or servants.' 17 Tex. Jur. 303, 304, sec. 86; Taylor & Co. v. Nehi Bottling Co. (Tex. Civ. App.) 30 SW (2) 494; Cox v. Bankers' Guaranty Life Co. (Tex. Civ. App.) 45 SW (2) 390."

4.

This Honorable Court erred in holding that the contract here did not call for work which was inherently dangerous, if skillfully performed, upon the proposition that the Appellant was engaged in leveling the ditch with pick and shovels, since the danger to Holt in doing this work from unexploded dynamite was reasonably foreseeable by the Appellee, at the time of entering into the written contract.

5.

This Honorable Court erred in holding that the contract did not call for the performance of inherently dangerous work which would place the absolute duty upon the Appellee to take such precautions to avoid injuries from the contractor's operation, since in this case, the contract called for great quantities of dynamite, requiring a period of several days of blasting at least for a distance of some two miles in rock; and the Texas Courts have always held that such amount of blasting is inherentiy dangerous and the fact that said blasting takes place upon open prairie lands *where a great number of employees are invited to participate in the blasting does not decrease the danger from unexploded dynamite, which was a danger accompanying the operation from beginning to end.*

See *Seismic Explorations v. Dobray*, 169 SW (2) 739, error refused, in which the Galveston Court of Civil Appeals said:

> "The evidence upon the trial showed as a matter of law, contrary to plaintiffs' assumption, that the contract between Phillips and Seismic did not contemplate any blasting operations. According to Webster, blasting means 'the practice or occupation of rending heavy masses, especially of rock, by means of explosives, as in oil-well drilling, quarrying, etc.' It is obvious that heavier charges of dynamite are required to rend heavy masses such as rocks than are required merely to produce and set in motion vibrations. The undisputed evidence showed that the maximum charge of dynamite which it was necessary or proper to be used

in the test then being made was a charge of dynamite weighing not more than half a pound. The contract contemplated that no greater charges of dynamite would be exploded than were normal for the purpose of making reflection seismograph tests. It is true that in the case of Cisco & N. E. Ry. Co. v. Texas Pipe Line Co., Tex. Civ. App. 240 SW 990, which dealt with blasing operations, stone, cast upon the land of another, was so large and cast with such force as to break a pipeline whereby 500 barrels of oil were lost; it was there held: That the Ry. Co. which had engaged an independent contractor to do the blasting was liable for the damages caused *because the contract provided for the performance of work which was intrinsically dangerous, however skillfully performed.* That case is cited in an annotation to a paragraph in 19 Tex. Jur. pg. 467, which reads in part; 'as to explosives set off by an independent contractor, it has been said that ordinary blasting operations in themselves are not considered as so intrinsically dangerous as to render the employer liable for the contractor's negligent acts; that is, the employer is not liable by reason of employing a contractor to do the work; there is not imposed upon him the absolute duty to take special precautions to avoid injuries from the contractor's operations.' So we see that the law recognizes that even blasting operations are not per se intrinsiaclly dangerous. *That the danger depends upon the size of the explosive discharge is obvious, and where the amount of explosive used is so small that it will not cause a shock great enough to do more than set up vibrations, and not great enough to amount to BLASTING, such operation cannot be called intrinsically dangerous.* We have seen

that the Phillips did not engage to have work performed which was 'intrinsically dangerous, no matter how skillfully performed.' "

SINCE THE MOTION FOR REHEARING WAS OVERRULED IN THIS CASE, WE HAVE DISCOVERED THE FOLLOWING ADDITIONAL EVIDENCE WHICH WE FEEL REQUIRES THAT A WRIT OF CERTIORARI BE GRANTED: THAT EVIDENCE IS REFLECTED IN THE AFFIDAVIT OF JAMES E. JETT, A TRUE AND CORRECT COPY OF WHICH IS HERE SET FORTH:

My name is James E. Jett. I was dynamite man for T. E. King Construction Company on the job that Ward Holt was injured on by virtue of an unexploded charge of dynamite.

We were setting off the dynamite recklessly and carelessly. By this, I mean that we were taking a fuse and cutting notches in it so that fire would burn through the fuse and every time that the fire would burn through, we would apply it to another shot that had been theretofore set.

We would load approximately one hundred and fifty (150) shots at a time and then we would apply the fire to as many shots as we thought safe and then we would run.

Under such circumstances, we would often leave unexploded shots. On several occasions we would go back and relight unexploded shots.

On the morning that Holt was injured, we found and reshot a number of unexploded shots some four

or five in the place where Holt was injured. We did this before Holt's injury.

We were lighting as high as 30 shots at a time before the date of Holt's injury. However, after Holt's injury, we were required to slow down to five or ten shots at a time so that we could be sure to count them, and thus, explode all of the dynamite that we had theretofore set out.

Some, in fact, many of these holes were drilled and loaded at night due to the fact that we were trying to keep ahead of the pipe line gang and it was necessary that the ditch be dug before they could lay the pipe.

The orders that we had were to get the job done as quickly as possible since we, that is the dynamiting crew, were behind with our work.

I am well acquainted with Tony Hudler and Koepps. They were with the dynamiters a great deal of the time because they had to pass upon the depth of the ditch.

The dynamiting crew, that is myself, Reed, and Fred Hobbs and Ed Hubbs, knew that there was unexploded dynamite in the vicinity of where Holt was injured before he was injured.

We discussed the fact that these unexploded shots were present among ourselves and I am sure that the above named inspectors, Tony Hudler and Koepps, must have heard us since they were with us practically all of the time.

I do know positively that Tony Hudler and Koepps

personally knew and saw that it was necessary for us, that is the dynamiting crew, to go back and relight unexploded dynamite a number of times before the time of Holt's injury. They therefore, knew that there was great danger at all times from unexploded dynamite.

I have had ten or twelve years experience shooting dynamite and the only safe way to shoot dynamite is with a battery and electric fuses. This is the customary way to shoot same. We did not shoot same with a battery on this occasion because no battery was furnished us.

The other contractors that I have worked for in setting out dynamite who did furnish a battery are Jack Walton, Hobbs, N. M.; Bill Hamrenhand, Dallas, Texas; and R. H. Fulton Construction Company, Lubbock, Texas.

I was doing the same type of work for the other contractors, that is—digging a pipe line ditch and the battery is convenient and practical as well as safe.

T. E. King is the only contractor that I ever worked for in setting out dynamite that failed to use a battery and electric fuses since it is recognized that this is the customary, proper and only safe way to shoot dynamite.

I am a licensed dynamite shooter.

A good personal friend of mine who was at the time and still is employed by the Texas-New Mexico Pipe Line Company told me that "If I was you, I wouldn't

have anything to do with that case since it might hurt you in going to work for the Texas-New Mexico."

At that time, I was intending to go to work for the Texas-New Mexico. This is the reason I did not tell Mr. Watts, attorney for Holt, when he phoned me in Houston, Texas, the matters here set forth.

I have read the above statement in its entirety and same is true and correct.

WITNESS MY HAND this 16th day of February, A. D. 1945.

/s/ JAMES E. JETT
JAMES E. JETT

STATE OF TEXAS)
COUNTY OF CRANE)

Before me, the undersigned authority, on this day personally appeared James E. Jett, to me well known, who after being by me duly sworn, deposes and says that he has read the foregoing statement and same is true and correct.

/s/ JAMES E. JETT

SWORN TO AND SUBSCRIBED BEFORE ME, this 16th day of February, A. D. 1945.

/s/ EUGENE J. WASSON
Notary Public in and for
Crane County, Texas

My commission expires 6-1-45.

II.

Jurisdiction

(1) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, (28 U. S. C., Sec. 347).

(2) The judgment of the Court of Appeals was rendered in a civil action.

(3) The date of the judgment to be reviewed is December 8, 1944.

Petition for rehearing filed by respondents was denied January 13, 1945. And on April 13, 1945, Justice Black extended the time of filing to May 12, 1945.

(4) It is believed that the following cases sustain the jurisdiction of this Court:

West v. American T. & T. Co., 311 U. S. 223, 85 L. ed. 139;
Story Parchment Co. v. Patterson Parchment Paper Co., et al, 282 U. S. 555, 75 L. ed. 544;
Galloway v. United States, 319 U. S. 372, 87 L. ed. 1458;
Cities Service Oil Co. v. B. P. Dunlap, et al, 308 U. S. 208, 84 L. ed. 196;
Griffin v. McCoach, 313 U. S. 498, 85 L. ed. 1481.

(5) The decision of the Court below conflicts with the decisions of other Circuit Courts of Appeals on similar matters and said Circuit Court has decided important questions of local law in a manner in con-

flict with the decisions of the Texas Courts, and said Circuit Court has decided important questions of general law in a manner that is conflicting with the weight of authority; and the opinion of the Circuit Court constitutes such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Wherefore under Rule 38 (5) (b) of the Revised Rules of the Supreme Court of the United States, this discussion may be reviewed by this Honorable Court.

III.

Principal Questions Involved

(a) That an employer of an independent contract is liable for an negligent order which proximately causes an invitee's injury, which such order is given within the scope of his employment by his employee.

(b) That the evidence in this case and particularly the evidence discovered since the Motion for Rehearing was overruled by the Circuit Court of Appeals, as set out in the affidavit of the said Jett, raises the issue of actual knowledge of the presence of the dynamite on the Respondent's premises, and hence it was a question for the jury as to whether the Respondent should have removed the dynamite from their premises prior to Petitioner's injury, or at least have warned the Petitioner of the presence of the dynamite on their premises.

(c) The opinion of the Circuit Court is in error and in conflict with the Texas decisions when it held that the work here involved was not intrinsically or inherently dangerous.

IV.

Reasons Relied on for Allowance of the Writ

We feel that the Motion for Rehearing together with the affidavit of Jett setting forth newly discovered evidence as heretofore set out, *clearly shows the necessity of this Honorable Court granting this writ in order that justice may be done.*

WHEREFORE, your Petitioner prays that a writ of certiorari issue under the seal of the Supreme Court of the United States, directed to the United States Circuit Court of Appeals for the Fifth Circuit, demanding that Court to certify and send to this Court a full and complete transcript of the Record and of the Proceedings of the said United States Circuit Court of Appeals for the Fifth Circuit had in this cause numbered and entitled on the docket "Number 10,838, Ward Holt, Appellant v. Texas-New Mexico Pipeline Company, Appellee," to the end that this cause may be reviewed and determined by this Court, as provided for by the Statutes of the United States, and that the judgment here of the said United States Circuit Court of Appeals be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated this 10th day of May, 1945.

THEODORE MACK
Fort Worth, Texas
JOHN J. WATTS
Crane, Texas
Attorneys for Petitioner
Ward Holt

of Counsel

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

Jurisdiction

The grounds of jurisdiction stated in the petition, which is printed in this brief, will suffice and for the sake of brevity will not be here reprinted.

II.

Statement of the Case

The facts pertinent of the question presented are stated in the petition and in the interest of brevity are not repeated here.

III.

Specification of Error

The error which the Petitioner will urge if the writ of certiorari is issued is as follows:

The Court of Appeals for the Fifth Circuit, which affirmed the judgment of the District Court for the Western District of Texas erred in not reversing and remanding the judgment for a new trial.

Argument

The Honorable Fifth Circuit Court in an opinion by Mr. Justice Holmes has decided (a) that "since it is clear that Holt's injury resulted from a danger created solely by the negligence of the employees of an independent contractor" and (b) "since the work

being done was of a character not intrinsically dangerous, if skillfully performed, the company was not shown to have violated any duty delegable or otherwise owed to the Appellant."

The Honorable Fifth Circuit Court also said in the course of its opinion that Petitioner relied upon only two propositions of law and we respectfully call to the attention of this Court that we relied on four principles of law, the last two of which were thoroughly discussed in our Supplemental Brief, which was filed after oral argument was had in this cause; and due to the fact that we sincerely believe that the Fifth Circuit Court is wrong in its decision, we ask this Honorable Court to grant the petition for certiorari and to consider these two additional propositions, due not only to the importance of this matter to this seriously injured man, but also due to the importance of this question to hundreds of thousands of workmen who must toil in the future engaged in the performance of the type of work that Holt was engaged in.

In other words, if this decision stands, an employer can sublet his contract, when he has dangerous work to perform, to an insolvent sub-contractor and thus evade all responsibility with the tragic consequences that will often follow.

However, there are many Texas authorities to support our view that Holt would never have been injured had Hudler not sent him back to this spot where unexploded dynamite had remained on the premises for at least 24 hours, even if we assume that it was left there by the independent contractor. Of course,

if it had been left by the defendant's employees, it would be immaterial as to how long it had remained there. Hudler not only complained of the work to the crew, but under the contract, if he had any complaint to make, it should have gone to the contractor, himself. He went further than this, and directed them to go about leveling off this portion of the ditch in a manner certain to cause injury.

The Circuit Court says further that the company had no knowledge of the danger and yet, under the newly discovered evidence of Jett, they did have knowledge. In Texas and in all other states, constructive knowledge is the equivalent of actual knowledge. This is fully established by Vol. 35, Am. Jur., Section 129. It is elementary that if the evidence was sufficient to raise the issue of constructive knowledge, then the question of whether the defendant should have discovered and removed the dynamite becomes a jury issue.

This is the plain effect of the decision cited by Respondent in *Wilton v. City of Spokane*, 132 Pac. 404, which incidentally involved an injury arising from an unexploded charge of dynamite.

The holding that the work was not intrinsically dangerous because the blasting was to be done on open prairie lands is absolutely in conflict with and repelled by the decision in *Seismic Exploration v. Dobray*, 169 SW (2) 739. The holding in that case which repels that contention and shows that the blasting here involved was intrinsically dangerous is set out in our petition.

The fact remains that ever since the decision in *Erie Ry. Co. v. Tompkins*, 114 A. L. R. 1487, by the Supreme Court of the United States, it is the law of Texas that must be applied as the Supreme Court said in that case on page 1492: "Except in matters governed by the Federal Constitution or the acts of Congress, the law to be applied in any case is the law of the State, and whether the law of the State shall be declared by its Legislature in a statute, or by its highest court in a decision is not a matter of Federal concern. There is no Federal General Common Law."

However, the Fifth Circuit Court apparently recognizes that where the work is inherently dangerous, the rule of collateral negligence has no application.

The Fifth Circuit Court in the footnotes of the opinion cites the quotation from Tex. Jur. in support of the contention that the blasting here was not intransically dangerous, but in the Dobray case, supra, the distinction is clearly shown and where sufficient dynamite is required to blast rocks, then the work is intrinsically dangerous, and out-of-state decisions holding otherwise, we respectfully submit, should not control the decision of this Honorable Court. Even as to the out-of-state decisions there are distinguishing facts and circumstances such as the order of Hudler and evidence charging the defendant with constructive knowledge of the presence of the dynamite on their premises, which are here involved, and was not involved in any of the cases cited in the footnotes of the opinion.

The Fifth Circuit Court has given the decision in Loyd v. Herrington a construction, which we respect-

fully submit is unwarranted. The negligence here was not at all collateral. The injury resulted from the order of Hudler to Holt to go back down and dig out this dynamite. The Supreme Court said in the Herrington case, 182 SW (2) 1003: "In determining the liability of this Petitioner, the only important inquiry is whether the injury resulted from the nature of the inherently dangerous work and whether it should reasonably have been anticipated by the parties."

In the Texas Bar Journal of December, 1944, under annotations, the Chairman of the Insurance Section of Texas, the Honorable Wm. Ryan of Houston, Texas, apparently gives the case the same construction as the writer. I quote from page 411 of the Texas Bar Journal: "Since it is admitted that the dynamite cap in question was affixed to the motor of the truck as a prank by an employee of the independent contractor, it is obvious that there is no liability on Loyd unless the case comes within the rule that an employer is liable for the negligent acts of an independent contractor with respect to the performance of work which is inherently dangerous. That rule applies only to the actual performance of work, however, and has no application to an injury resulting from an act or fault purely collateral to the work and which arises entirely from the wrongful act of the independent contractor or his employee. The injury to the plaintiff in this case did not result directly from the work which had been authorized to be done and would not have occurred at all except for the prank played by the employee of the independent contractor. The rule invoked

by Plaintiff is not applicable because the injury should not have been reasonably anticipated by the parties."

In the case at bar, can it be said that it was not reasonably foreseeable by Hudler, who knew that dynamiting had been done along the premises where he was sending the crew back to dig out the mounds, and who knew that unexploded shots had been discovered in the vicinity, that if the pick struck an unexploded cap that an explosion would occur? Is this not an injury arising from the actual performance of the work? Doesn't the Supreme Court, itself, recognize that the work in the Herrington case was inherently dangerous by their very opinion?

The Fifth Circuit Court, we respectfully submit, when it holds that the work involved here was not inherently dangerous is in direct conflict with the decisions referred to.

We further respectfully submit that the Supreme Court did not in any wise refute that portion of the opinion by the Fort Worth Court of Civil Appeals in the Herrington case that held that where dynamite was involved, the work was inherently dangerous. The Fort Worth Court of Civil Appeals said, speaking through Justice Speer (178 SW (2) 700):

> "It is the settled rule in Texas that a master who employs inherently dangerous instrumentalities for the consummation of his contract is charged with the duty of exercising a very high degree of care in the use and custody of these instrumentalities, to prevent injury to others; and when he entrusts such dangerous articles to his employees, or others performing the contract for him,

their negligence will be imputed to the master. Atex Construction Co. v. Farrow, Tex. Civ. App. 71 SW (2) 323, writ refused.

"In this connection appellant pleaded and here contends that since it was stipulated that he sublet his contract to build the road in Stephens County to Johnson, an independent contractor, and Johnson's employees did the acts complained of by appellee, appellant cannot be held liable therefor. The general rule in such situations is not applicable in cases of the nature here involved. The exception to that rule arises when the contract directly requires the performance of a work intrinsically dangerous, however skillfully it may be performed. This is true because the original contractor is the author of the mischief resulting from it, whether he does the work himself or lets it to another. Cameron Mill & Elev. Co. v. Anderson, 98 Tex. 156, 81 SW 282, 1 L. R. A. N. S. 198. Similar are the principles announced in Kampmann v. Rothwell, 101 Tex. 535, 109 SW 1089, 17 L. R. A. N. S. 758; El Paso Electric Co. v. Buck, Tex. Civ. App. 143 SW (2) 438, writ refused, want of merit."

In conclusion, in support of our position here that the work is intrinsically dangerous and that hence, a recovery should be allowed, we desire to quote briefly from the case of *Pittsburgh, C. & St. L. Ry. Co. v. Shields*, 24 N. E. 658, in which the Court said in part:

"The law requires of persons having in their custody instruments of danger that they should keep them with the utmost care. 1 Hil. Torts, (3rd Ed.) 127. 'Sometimes,' says Pollock, 'the term "consummate care" is used to describe the amount

of caution required; but, he says, 'it is doubtful whether even this be strong enough. At least we do not know any English case of this kind (not falling under some recognized exception) where unsuccessful diligence on the defendant's part was held to exonerate him.' (Pol. Torts, 407.) See also Whart., Neg., Section 851. And it stands to reason that one charged with a duty of this kind cannot devolve it upon another, so as to exonerate himself from the consequences of injury being caused to others by the negligent manner in which the duty in regard to the custody of such an instrument may be performed. Speaking of the absolute duty imposed by statute in certain cases, or also, the duties required by common law 'of common carriers, of owners of dangerous animals, or other things involving, by their nature or position, special risk or harm to neighbors', Pollock observes: 'The question is not by whose hand an unsuccessful attempt was made, whether that of the party himself, of his servant, or of an "independent contractor," but whether the duty has been adequately performed or not.' Pol., Torts, 64. We in no way limit nor question the soundness of the general rule which exonerates the master from liability for the acts of his servant done outside of his employment. What has been stated is strictly within the reason and principle of the rule, which is that whatever the servant is intrusted by the master to do for him must be done with the same care and prudence that would be required of the master acting in that regard for himself. If it be the custody of dangerous instruments, he must observe the utmost care. The inability of the master to shift the responsibility connected with the custody of dangerous instruments, employed in his

business, from himself to his servants intrusted with their use, is analogous to, and may be said to rest upon, the same principle as that which disenables him from shifting to an independent contractor liability for negligence in the performance of work that necessarily tends to expose others to danger, unless the work is carefully guarded. It seems by the great weight of authority, and reason that this cannot be done. See R. R. Co. v. Morey, 47 Ohio St.,—ante 269, and cases there cited. Also see Lawrence v. Shipman, 39 Conn. 586, 589; and Cooley, Torts, (2d Ed.) 644, 646. And the relation of master and servant, and that of employer and independent contractor, are, in this regard, treated in one view by Pollock in his work on Torts, as will appear from consulting his work at page 64."

Corpus Juris states the rule clearly in Vol. 39, p. 1288, Sec. 1483, note 41. The rule there is compared by analogy to the relationship of employer and independent contractor as follows:

"Analogy to relation of employer and independent contractor.—In respect of work necessarily dangerous 'the inability of the master to shift the responsibility connected with the custody of dangerous instruments, employed in his business, from himself to his servants entrusted with their use, is analogous to, and may be said to rest upon the same principle as that which disenables him from shifting to an independent contractor, liability for negligence in the performance of work that necessarily tends to expose others to danger, unless the work is carefully guarded. It seems *by the great weight of author-*

ity and reason that this cannot be done.' Pittsburgh, etc., R. Co. v. Shields, 47 Oh. St. 387, 393, 24 N. E. 658, 21 Am. St. R. 840, 8 L. R. A. 464. See also infra 1540 et seq."

Again it is said in the well considered case of *Barmore v. Vicksburg*, 38 So. 210:

"An attempt has been made, in a very few illogically reasoned cases, to draw a distinction between instrumentalities 'dangerous in themselves' and those 'dangerous by reason of improper use,' and confine the master's liability to cases due to mismanagement of the former class alone. An analysis will show that the distinction is more imaginary than real, and too refined to be of any practical benefit as a method of determining legal responsibility."

In conclusion, *the invitee here occupies the same position as a customer in a store.* Judge Thompson in his work on Negligence, Section 680, said: "On the other hand, the servant of the contractor must be deemed on the premises of the proprietor by invitation, express or implied, and therefore owes him the same duty of guarding him against the consequences of hidden dangers on the premises that a proprietor would in any case owe a guest, a customer, or any other person coming by invitation on his premises."

Section 968 of the Thompson's Commentaries on the Law of Negligence, and Section 979 thereof, are specially recognized as presenting the controlling rules in an enlightening opinion by Justice Sharpe of the Supreme Court of Texas, in the case of *Montgomery v. Houston Textile Mills*, 45 SW (2) 140.

We also refer this Honorable Court to Section 679 of Judge Thompson's work. *These rules of law recognized by the Supreme Court of Texas present one of the elements under which this Plaintiff is entitled to recover which has not even been considered by the Fifth Circuit Court.*

The application of the rules of law announced in American Jurisprudence were applied by Mr. Justice Alexander, now of the Supreme Court, in the case of *R. E. Cox Co. v. Kellogg*, 145 SW (2) 675. We quote from that case as follows:

> "The court submitted to the jury an issue as to whether prior to the accident, Cox had notice of the cases in the aisle. The jury answered the issue in the negative. In connection with said issue, the Court instructed the jury that by the term 'notice' was meant 'knowledge of such fact or facts as would put an ordinarily prudent person on inquiry, which inquiry, if followed with reasonable diligence, would lead to the discovery of the main fact, that is, the fact in question.' We must presume therefore that Cox not only had no actual knowledge of the existence of the cases in the aisle, but that said defendant did not have actual knowledge of any fact which would have put a reasonably prudent person on inquiry, but even though Cox had no such knowledge or notice, said defendant would be liable if the dangerous situation had existed long enough that a reasonably prudent person, in the exercise of ordinary care in looking after a store such as here under consideration, would have discovered and removed the dangerous situation, for while a storekeeper is not an insuror of the safety of his cus-

tomers while in his store, he is obligated to exercise ordinary care to keep the premises in a reasonably safe condition for their protection. 30 Tex. Jur. 871; 45 C. J. 837; Graham v. F. W. Woolworth Co., Tex. Civ. App. 277 SW 223; Texas-La. Power Co. v. Webster, 127 Tex. 126, 91 SW (2) 302, 306; Bustillos v. Southwestern Portland Cement Co., Tex. Com. App., 211 SW 929. The mere finding that Cox had no knowledge of any fact which, if reasonably pursued, would have led to a discovery of the defective condition does not acquit said defendant of negligence in failing to exercise ordinary care to discover such facts. A storekeeper must exercise some care to see that his store is kept in a reasonably safe condition for his customers, even though he has no actual knowledge of any fact that would lead him to believe that a dangerous situation existed. Consequently, we must determine whether there was sufficient evidence to show that the sample cases had been in the aisle in such position as to create a dangerous situation long enough that, by the exercise of ordinary care, Cox should have discovered and removed same prior to the accident."

Surely, this case proves conclusively that the Texas-New Mexico Pipe Line Company should have exercised some care to see that their premises were kept in a reasonably safe condition for their invitees *even though we assume that they had no actual knowledge of any fact that would lead them to believe that a dangerous situation existed* under the Texas holding in the Cox case supra.

In this case they not only knew that thousands of dynamite caps had been brought on the premises and

that a negligent method of exploding them, by the means of individual fuses, was being used; but they also knew and were charged with the knowledge that unexploded shots are often present, and had been discovered on the morning before Holt was injured.

We respectfully submit that under this last theory disregarding all others that a recovery should be had by the Petitioner. If this Honorable Court were presented with a situation wherein the proprietor of a store invited one to come into his store for the purpose of levelling ditches, after the independent contractor had brought thousands of dynamite caps on the premises—if this proprietor instructed this man who had no knowledge where the dynamiting had been done and who knew nothing about dynamite, to go back and dig out with a pick in a ditch containing mounds which indicated unexploded dynamite to an experienced eye (and the proprietor was charged under the law quoted in Am. Jur. with this knowledge), and if the proprietor knew that unexploded dynamite had been discovered on that very day in that very vicinity or area, and this fellow was so injured, *would there be any difficulty in determining whether the proprietor of the store was liable?*

We think not, and yet under the rules of law above set out if the invitee is entitled to recover in that case, the same rules of law apply here.

As said in the Restatement of the Law of Torts on page 944:

> "A possessor who holds the land open to others for his own business purposes must possess and

exercise a knowledge of the dangerous qualities of the place itself, and the appliances provided therein which is *NOT* required of its patrons."

The same rule applies to the invitee who works for the employer's benefit.

Under the evidence in this case Hudler is bound to have seen the mounds containing the unexploded dynamite or else he would not have sent Appellant and his coworkers back to dig them out.

Under the law as above announced and in keeping with the following decisions, it makes no difference if the presence of the mounds in the ditch did not indicate unexploded dynamite to Hudler; hence, the error of this Honorable Court in holding that the Defendant did not have knowledge of the danger.

In this connection see: *Boal v. Electric Stor. Battery Co.* (3rd Cir.), 98 F. (2) 815, 818 (6); *Maty v. Grasselli Chemical Co.* (3rd Cir.), 98 F. (2) 877, 880 (5). These cases hold that, with reference to the duty of the employer to exercise ordinary care to furnish a safe place for his work to be performed, "It makes no difference whether or not the defendant was actually aware of the danger for it is 'charged with the knowledge of * * * the nature of the constituents and general characteristics of the substance used in his business, so that he can give directions for the conduct thereof with ordinary safety to his servants performing the work with ordinary care.' "

As a matter or fact, the use of the words "inherently dangerous work if skillfully performed" is mis-

leading. The Supreme Court of Texas in *Loyd v. Herrington*, supra, quoted from 27 Am. Jur. 517, Sec. 39, thus defining inherently dangerous work as follows: "An employer is liable for injuries caused by the failure of an independent contractor to exercise due care with respect to the performance of work which is inherently or intrinsically dangerous. The theory upon which this liability is based is that a person who engages a contractor to do work of an inherently dangerous character remains subject to an absolute non-delegable duty to see that it is performed with that degree of care which is appropriate to the circumstances; or in other words that all reasonable precautions shall be taken during its performance."

In other words, the Supreme Court of Texas recognized that any work regardless of how dangerous if skillfully performed would probably not result in danger. The question is whether the work was of a character that would be attended with danger to others.

How can this Honorable Court say that it was not in the contract that work would be performed which was calculated to bring about danger to others if precautions were omitted?

What would be the danger if precautions were omitted from the handling of dynamite to one who had to level off the ditch if it was not unexploded dynamite?

The case of *North American Dredging Co. v. Pugh*, 196 SW 255, states the rule in Texas:

> "For liabiilty to attach to the employer of an independent contractor, it is not required that it be absolutely necessary that injuries to third per-

> sons will result from the doing of the work, but if the work is so inherently or intrinsically dangerous that injuries will probably be occasioned to third persons unless proper precautions are taken, the employer may be liable for such injuries, though primarily they are caused by the negligence of the contractor in failing to take the necessary steps to avoid the danger."

As a matter of fact, the negligent handling of explosives in Texas, such as dynamite, constitutes a nuisance and as said in the Texas case of *Moore and Savage v. Kopplin*, 135 SW 1033, this is an exception to the general rule exempting the employer of the independent contractor from liability since the owner or occupant of real property cannot suffer to be done on his premises a nuisance. Other Texas cases of like import are *McGuffey v. Pierce Fordyce Oil Ass'n.*, 211 SW 335; *Texas Refining Co. v. Sartain*, 206 SW 553.

The Supreme Court of Massachusetts, in the case of *Curtis v. Kiley*, 26 N. E. 421, made this pertinent statement:

> "When the owner of premises which are under his control employs an independent contractor to do work upon them which from its nature is likely to render the premises dangerous to persons who may come upon them by invitation of the owner, the owner is not relieved by reason of the contract from the obligation of seeing that due care is used to protect such persons. The owner cannot continue to hold out the invitation without being bound to exercise due care in keeping the premises reasonably safe for use according to the invitation."

And in this connection we desire to add the discussion by the Supreme Court of Louisiana in the case of *Lincoln v. Appalachian Corp. of Louisiana*, 146 La., 83 So. 364, 7 ALR 1697, in which the Court says:

> "Plaintiff was not the employee of the defendant in the strict sense, he having been employed as above indicated by the Boylon Detective Agency, who held the watching of the building under contract.
>
> "But its duty to him in providing proper tools and appliances and in furnishing a safe place to perform his duties was for all practical purposes the same as if he had been an employee, not because of any contractual relation, but because of the duty to use 'ordinary care' toward those who worked on its premises for its benefit and with its knowledge and consent. Cleveland C. C. & St. L. R. Co. v. Berry, 46 L. R. A. 52."

The handling and use of dynamite constitutes not only inherently dangerous work but in the great decision rendered in *Exner v. Sherman Power Construction Co.*, 54 F. (2) 510, it was held:

> "The liability of the defendant is not founded on illegal storage or on negligence, which was not proved, but upon the ground that the use of dynamite is so dangerous that it ought to be at the owner's risk."

This case further said:

> "We can see no reason for imposing a different ground of liability for the results of an explosion, whether the dynamite explodes when stored or when employed in blasting."

We respectfully submit that in this case there can be no different liability imposed for blasting regardless of whether the plaintiff is injured at the time of the blast or thereafter due to a missed shot since, as said in the Exner case, supra, "The explosion occurred from an act connected with a business conducted for profit and fraught with substantial risk and possibility of gravest consequences."

The Exner case has received favorable comment in 45 Harv. L. R. 594, 17 Corn. L. Q. 703, 80 U. of Pa. L. R. 924.

Conclusion and Prayer

In Peters v. George 154 F. 634, the identical order to that of Hudler which the Circuit Court said was not dangerous and did not constitute negligence is referred to as criminal carelessness.

A comparison of 35 Cor. Jur. Sec., pg. 242, with 25 Cor. Jur., pg. 197, will show weight of authority has changed so that Cor. Jur. Sec. now holds both employer and independent contractor liable in blasting cases.

Secundum cites Texas case *Cisco Ry. Co. v. Texas Co.*, 240 SW 990, a case where blasting occurred in the country. Secundum also cites *Watson v. Black Mountain Ry. Co.*, 80 S. E. 175. This is a case where blasting operations took place days previously and occurred from unexploded shots yet intrinsically dangerous doctrine was applied. Last Texas case, 169 SW (2) 739, refutes doctrine announced by Court. Reagan testified the only safe way to remove mounds in ditches would

be to re-explode dynamite, so Holt's job of levelling the ditch with pick and shovel was intrinsically dangerous since danger was hidden.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision for a new trial on the merits thereof.

Respectfully submitted,

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A copy of the petition for writ of certiorari and brief in support thereof has been furnished to Eugene R. Smith of El Paso, Texas, attorney for Respondents.

(30)

No. [redacted] 1261

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

WARD HOLT, *Petitioner*,

v.

TEXAS-NEW MEXICO PIPE LINE COMPANY, *Respondent*

RESPONDENT'S OPPOSING BRIEF TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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ALPHA LAW BRIEF CO., HOUSTON

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LIST OF AUTHORITIES

CASES

TEXTS

No._____

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I.

Statement

On September 22, 1941, Petitioner, Ward Holt, while working for his employer, T. E. KING CONSTRUCTION COMPANY, was injured from an explosion of dynamite. The Construction Company carried Workmen's Compensation Insurance protecting its employees, including petitioner, and petitioner collected $3,000.00 from this insurance carrier by virtue of his injury (R. p. 141), which under the Texas Compensation Act is his exclusive remedy against his master, then filed this suit against respondent to recover damages arising out of the same injury (R. p. 2), on the theory that laying a pipe line across a West Texas pasture is ultra dangerous work, despite the use of skill, and that the contractee of such work is liable for injuries of the employees of the

independent contractor, although they arose from negligence of such independent contractor and not from the performance of the work.

The facts in this case as stated in the Circuit Court's opinion (145 Fed. (2d) 862), are hereby adopted by respondent, but for the sake of brevity will not be repeated.

II.

Reply to Petitioner's Objections to the Facts Stated in the Circuit Court's Opinion

To the Circuit Court's statement of the facts, petitioner makes only two objections. We state and discuss them in their order:

Petitioner asserts that the Circuit Court erred in holding:

> "Tony Hudler, a welding inspector employed by the Company to see that the work met with the specifications of the contract, came up to the group and told the straw boss that there were some humps or irregularities in the rock section of the ditch that would have to be dug out" (Petition, p. 5).

The statement of the Circuit Court of Appeals is substantially petitioner's own testimony. He testified that Tony Hudler was respondent's inspector (R. pp. 21, 22, 32) and that John Rush was straw boss for the independent contractor, King Construction Company (R. p. 32); and:

> "A. Well, these bumps, we were sent back by John Rush, carried us back. Tony Hudler told John Rush to go back. John Rush was straw boss, worked just like we did for King Construction Company. Tony Hudler told him to take some men and dig them bumps out of the ditch. So we was put on the truck.

John Rush picked out four of us, and the truck carried us back to these bumps about two miles back down the ditch, and told us to dig them bumps out from there on John Rush dug just like we did, he worked just like we did, he was helping us dig out the bumps" (R. p. 22).

A. Well, Mr. Rush and Mr. King was the only ones that ever gave me orders what to do" (R. p. 32).

That Rush took the men back, Hudler did not go with them (R. p. 33).

The court's statement is also supported, not contradicted, by the testimony of petitioner's witness Perkins (p. 43). The testimony of Perkins referred to by petitioner to the effect that Hudler sent the men back, was stricken and properly ignored by the court (R. p. 41), and Perkins' testimony left in the record on this point was:

"Q. What Mr. Hudler said was there were some high places back in the rocks that would have to be dug out, isn't that correct?
A. He said the high places would have to be dug out.
Q. He told that to Mr. Rush, your foreman, didn't he?
A. Well, yes, he told Rush to take some men and go back.
Q. He didn't tell Rush what men to take, did he?
A. Well, I couldn't say about that. He just came on and got us to go back.
Q. Rush came along and got you?
A. Rush did, and called us and took us back there" (R. p. 43).

Hudler was a welder inspector for respondent and his duties were to see that the welding job was performed by the contractor, King Construction Company, in accordance with the contract (R. pp. 122-124, R. pp. 111-112, R. pp. 127-128).

2. Petitioner's second objection to the fact findings stated in the opinion of the Court of ~~Civil~~ Circuit Appeals is that the Court ~~of Civil Appeals~~ erred in holding that: "The existence of the danger was unknown to the company"—meaning respondent (Petition, p. 5).

Following that objection, there appears in the petition statement from the record concerning Koepps and Enlow, who were also inspectors for respondent on the pipe line construction job being performed by King Construction Company, the independent contractor, but this statement does not by the farthest stretch of the imagination show any knowledge on the part of these inspectors as to the presence of unexploded dynamite where petitioner and his fellow employees were digging.

Tony Hudler was the only inspector for respondent whom petitioner even attempted to charge with knowledge of the presence of the unexploded dynamite (R. pp. 2-9), and throughout the trial of this case petitioner sought to impute this knowledge to Hudler, only because of the presence of the bumps in the ditch (R. p. 4, p. 68, p. 91, p. 106, p. 124, p. 137). Hudler testified positively: "I never had any idea there was dynamite there" (R. p. 138). The record shows without controversy that Hudler was a welder and had no duties with respect to the dynamiting, and was in fact inexperienced in the use of dynamite, and that a bump in a ditch to Hudler just meant a high spot in the ditch that would have to be removed before the pipe line could be lowered (R. p. 131):

"Q. Did it make any difference to you how the contractor cut down the bumps or leveled up the ditch?
A. That wasn't nothing to us. It was up to the contractor to give us a finished ditch.
Q. I will ask you whether it is anything unusual to have these bumps in the ditch that have to be

cleaned out before the pipe can be lowered?

A. I have never been on one where there wasn't they would have to keep a few men to level it down, the high spots, to set the pipe * * *

Q. If you had seen a bump out there in that ditch, whether or not there had been any dynamiting along anywhere, would you have thought there was a piece of unexploded dynamite in that bump?

A. No, it would not indicate that to me. It would just be a high spot as far as that is concerned; if it wasn't the right depth it would have been my duty to have asked them to get the thing to the right depth" (R. p. 132).

The record further shows that the bumps in the ditch did not indicate the presence of unexploded dynamite to petitioner (R. p. 34), nor to his fellow employees (R. p. 115). Perkins, petitioner's witness and fellow employee, also testified:

"Q. When did you first start digging bumps out of the ditch?

A. Well, just started whenever that had to be done. I don't know just when. There would be places, you know, that this rock would have to be dug up in order to lower your pipe line. I told you yesterday whenever that had to be done there was some sent back to do it" (R. p. 114).

So the record shows and common knowledge confirms that bumps in a ditch in pipeline construction were not unusual, but always encountered and had to be dug out before the ditch was ready for the pipe, and there is no evidence in the Record, and petitioner cites none, charging respondent with notice of this unexploded dynamite where petitioner and his fellow employees were working. In fact,

the testimony of Hudler that he did not know of the presence of the dynamite is uncontradicted.

Petitioner cites the case of APEX CONSTRUCTION COMPANY V. FARROW, 71 S.W. (2d), p. 325, but the first lines in that case:

> "Appellants did not produce either of the employees charged with the custody or possession and use of the dynamite caps"

in itself distinguishes it from this. Respondent had no employee charged with the custody or possession and use of the dynamite caps. The entire pipeline construction, including the dynamiting, was performed by King Construction Company, and not by respondent, and there is not one word to the contrary in the Record.

Consider: If the bumps charged Hudler with notice of unexploded dynamite, then the bumps charged petitioner with the same notice. Wherefore, petitioner cannot recover (RESTATEMENT OF THE LAW OF TORTS, Section 523).

Hudler owed no duty to petitioner to look for dynamite, and in the absence of such duty he could not be charged with constructive knowledge.

Humble Oil & Refining Co. v. Bell, 180 S.W. (2d) 970 (Tex. Civ. App.—affirmed by Texas Sup. Ct. on another ground, 181 S.W. (2d) 569);
Proctor v. San Antonio Street Ry. Co., 62 S.W. 939 (Tex. Civ. App.—writ denied);
Southern Oil Company v. Church, 74 S.W. 797, 75 S.W. 817 (Tex. Civ. App.—writ denied);
Hailey v. M. K. & T. Ry. Co., 70 S.W. (2d) 249 (Tex. Civ. App.—writ denied).

The duty here of protecting petitioner from the danger of the unexploded dynamite was cast in law upon petitioner's

master, King Construction Company under the master-servant relationship, and not upon respondent; and in this connection the master-servant authorities cited by petitioner (PETERS v. GEORGE, 154 Fed. 634; BOAL v. ELECTRIC STORAGE BATTERY CO., 98 Fed. (2d) 815; MATY v. GRASSELLI CHEMICAL CO., 98 Fed. (2d) 877, and AMERICAN JURISPRUDENCE, Vol. 35, Section 129) are not in point, because obviously they refer to a different relationship and different duties than those here involved. King Construction Company, the independent contractor, and his employees were under the contract and in fact in possession and control of the premises and used its own means and methods in constructing the pipeline, being responsible to respondent for only the final result.

R. E. COX CO. v. KELLOGG, 145 S.W. (2d) 675, cited by petitioner, is not in point because of the difference in the legal duties owed by the storekeeper in that case and respondent in this case. Here the independent contractor was under the contract and in fact placed in possession and control of the right of way, and was itself charged with the duty to keep it safe for those whom it impliedly invited or permitted to enter thereon. Moreover, the accident in this case arose from the positive acts of negligence of the independent contractor during the course of the performance of the contract, purely collateral to the contract, and not from any defect or danger on the premises of which respondent had possession or control or with respect to which respondent owed any duty to the independent contractor or its servants. See Annotation 44, A. L. R., p. 950.

The record shows that it was the duty of Jett and the dynamite crew working for the independent contractor, and their duty alone, to remove any unexploded dynamite, and that they were the only persons who could have learned

of the presence of the unexploded charges, because they had set out the shots and knew their location.

Petitioner's witness Reagan testified:

"Q. Mr. Reagan, as you have testified here if a stick of dynamite did not go off, whether or not there would be any mound there that you could tell anything about would depend somewhat on how close together the shots were put, isn't that true?

A. That is what I am saying, but the man who spaces the holes, he knows just about where his holes should be, and he steps them off, you know, one, two, three steps, and he, after the charges have exploded he looks over his terrain, the man that is in charge, he will be the one to see what damage—or in other words what good his shooting has done.

Q. The man in charge of the dynamiting, isn't it a fact the man in charge of the dynamiting after the dynamiting is done he look(s) where it has been done, isn't that right?

A. Yes, sir.

Q. That is his job?

A. Then move the loose—

Q. Then if there is a charge that has not gone off it is the job of the man that has set out the dynamite to do something about it, isn't that right?

A. Yes, sir" (R. pp. 92-93).

Petitioner's witness Holcomb testified:

"Q. Now, if you set off dynamite with individual fuses isn't it customary for the man who sets off the dynamite to count the explosions as they go off, in order to see whether every charge he put out has been exploded?

A. Yes, sir, it is customary.

Q. That is his job, that is his duty, isn't it?

A. Yes, sir.

Q. In those dynamiting operations isn't it a fact that the man that sets off the dynamite usually sees that the charges are exploded or he removes them?
A. Yes, sir.
Q. The man that sets out a charge of dynamite, he is the only one that knows how many charges there are and where they have been set out, is that right?
Q. That is correct, isn't it?
A. Yes, sir.
Q. Of course, if a man can count correctly and listen correctly he can tell from the sound whether all the charges he has set out have been exploded, can't he, by individual fuses?
A. Yes, sir, he could if he could count correctly and listen correctly.
Q. Now, when a man that has set out the dynamite looks over the place where it has been set out, after the explosion, if he sees a place there where he sets a charge and it has not been exploded then he knows there is still an unexploded charge there, doesn't he?
A. Yes, sir, he should" (R. pp. 82-83).

So here Hudler had the right to assume, and did assume (R. p. 139), that the independent contractor's dynamite crew had performed their duties properly, and Hudler was not required to anticipate the negligence of Jett and his crew in leaving dynamite in the ditch. To impute this knowledge to Hudler would impose on him the burden of anticipating Jett's negligence. This is not the law in Texas.

Railway v. Shetter, 59 S.W. 533 (Tex. Sup. Ct.);
Railway v. Napier, 143 S.W. (2d) 754 (Tex. Sup. Ct.).

We respectfully submit that the Circuit Court properly held:

"The existence of the danger was unknown to the company, and such knowledge could not be imputed to it; nor was the danger of the injury reasonably foreseeable."

III.

Answer to Jett's Purported Affidavit
(Petition, pp. 11-14.)

(1) Respondent objects to the ex parte affidavit of James E. Jett, p. 11 of the Petition, and moves to strike it from said Petition because same is no part of the Record. This ex parte affidavit is not a part of the Record, and as this Honorable Court has held many times, new evidence not before the trial court cannot be received by the Supreme Court, but the Court is required to pass on the Record as certified by the Circuit Court.

Russell v. Southard, 53 U.S. 139, 12 How. 139, 13 L. Ed. 937;
Roener v. Simon, 91 U.S. 149, 23 L. Ed. 267;
Schley v. Pullmans Palace Car Co., 120 U.S. 575, 30 L. Ed. 789;
Bechtel v. U. S., 101 U.S. 597, 25 L. Ed. 1019;
Hecht v. Boughton, 105 U.S. 235, 26 L. Ed. 1018;
Thornton v. Carson, 11 U.S. 596, 3 L. Ed. 451;
McClellans v. Garland, 54 L. Ed. 762.

Appellate Courts must confine their consideration to the record, or exercise original and plenary jurisdiction to try the new issues raised, or deny to the litigants due process of law. This Honorable Court has never assumed original jurisdiction of ordinary lawsuits between citizens such as this, and certainly will not act upon an ex parte affidavit, which on its face shows the affiant most vulnerable to cross-examination, without according to respondent the right of cross-examination of the affiant, and the further right of impeaching or contradicting him. To do so would be to deprive respondent of its constitutional right of trial by jury and of due process of law.

(2) The record in this case would not entitle petitioner to a new trial upon the ground of the allegedly newly discovered evidence of Jett set up in the ex parte affidavit, even if it had been filed seasonably in the trial court, for no justification is shown for petitioner's failure to produce the witness in court for examination and cross-examination. The vague insinuations and palpable conclusion in the ex parte affidavit in themselves demonstrate their vulnerability to cross-examination.

(3) This ex parte affidavit does not show that Hudler knew there was unexploded dynamite at the time and place Rush, the independent contractor's straw boss, took the men, including petitioner, to dig out the bumps. That high place in the ditch was some two miles from where the men started, and the most that can be said for the affidavit is that it contains a conclusion, a surmise without factual support that Koepp and Hudler must have known that the dynamite crew had at times relighted unexploded dynamite, as it was their duty to do.

Hudler, however, owed no duty to Petitioner to search for unexploded dynamite or to warn the independent contractor or its servants of dangers arising during the course of the work, especially when such dangers arose from negligence of such servants. Apparently Petitioner knew more about the situation than Hudler.

Hudler had the legal right to rely upon Jett and his crew performing their duties with ordinary care in either relighting unexploded dynamite or advising their fellow employees, including Petitioner, of its presence, and was under no duty to anticipate negligence or danger arising therefrom.

IV.

Answer to Petitioner's Contention That Holt Telling Rush, the Straw Boss, to Take Some Men Back and Dig Out the Bumps Was a Negligent Order

(Pet. p. 16, Brief p. 19.)

1. As shown from quotations from the Record, post, page 2, et seq., Hudler's statement to Rush, the straw boss of the independent contractor, was nothing more than an expression in layman's language of the employer's idea that the result contracted for had not been completed according to the specifications in the contract, and was but the exercise of the respondent's contractual right to exact performance in accordance with specifications. LONE STAR GAS CO. v. KELLY (Tex. Com. App.), 46 S.W. (2d), p. 657, Par. 4. The ditch had to be to a uniform level depth before the pipe could be laid (R. p. 130), and as Hudler stated, it made no difference to him how the contractor cut down the bumps or leveled up the ditch—"it was up to the contractor to give us a finished ditch" (R. p. 132).

2. After all, the sole proximate cause of Petitioner's injury was the negligence of Jett and the independent contractor's dynamite crew, wholly collateral to the result for which the Petitioner contracted.

3. The only legal relationship between Holt and respondent or Hudler which could confer legal right upon Hudler to give Holt any order, is the relationship of Master and Servant, which did not exist, but which if existing would bar Holt's right to recover in tort, for the Workmen's Compensation Act of Texas affords Holt his exclusive remedy against his Master, and he has successfully exercised that remedy.

V.

Answer to Petitioner's Contention That Respondent Owed Petitioner the Duty to Furnish a Safe Place to Work

1. As held by the Circuit Court, this principle has no application to the situation here presented. The premises were free of danger at the time the independent contractor took possession, and the premises were rendered unsafe solely by the failure of the independent contractor or his employees to remove the unexploded dynamite.

2. MONTGOMERY v. HOUSTON TEXTILE MILLS, 45 S.W. (2d) 140 (Tex. Com. App.), and similar cases relied on by petitioner are distinguishable, in that there defendant was held liable not for a condition brought about by the independent contractor, but for a condition caused by defendant's own employees, and this distinction between our case and MONTGOMERY v. HOUSTON TEXTILE MILLS is so well expressed in HAILEY v. M. K. & T. RY. CO., 70 S.W. (2d) 249 (Tex. Civ. App., writ denied) that we cannot improve on the language there, and that case is a complete answer to petitioner's contention. It is stated in the headnote:

> "Where employee of independent contractor constructing railroad underpass was injured by cave-in, railroad held not negligent in failing to furnish such workman safe place to work, in failing to warn him of cave-in, or in failing to inspect premises, or to brace walls."

Also on this point please see:

Humble Oil & Refining Co. v. Bell, 180 S.W. (2d) 970;
Proctor v. San Antonio Street Ry. Co., 62 S.W. 939 (writ denied);

Southern Oil Company v. Church, 74 S.W. 797, 75 S.W. 817 (writ denied);
Anno. 44 A.L.R. p. 950; p. 1004.

3. In DAYTON v. FREE (Utah Sup.), 148 Pac. 408, plaintiff was injured by an unexploded charge of dynamite left in the mine by a previous shift. There the Supreme Court of Utah held that the employer defendant did not owe any duty to plaintiff, employee of independent contractor, to warn him of the unexploded dynamite, or to guard him against dangers created by the negligence of the independent contractor and his employees.

VI.

The Judgment of the Trial Court and the Circuit Court Are Correct, the Three Controlling Reasons Following

1. The contract between Respondent and King Construction Company did not call for work intrinsically dangerous, in that the contract could be performed with safety by the exercise of ordinary care on the part of the independent contractor and his employees.

In CAMERON MILL & ELEVATOR COMPANY v. ANDERSON (Tex. Sup.), 81 S.W. page 282, the Supreme Court of Texas laid down the rule on this question, since followed by our Texas Courts, in this language:

> "As we understand, the general rule is that one who is having a piece of work done by an independent contractor is not liable for the negligence of the latter, but to this rule there is a well-marked exception. So far as we have seen, the limitation of the rule has been by no one better expressed than by Judge Dillon. He says:

> 'The general rule is stated in the preceding section, but it is important to bear in mind that it does not apply where the contract *directly* requires the performance of a work intrinsically dangerous HOWEVER SKILLFULLY PERFORMED. In such a case the party authorizing the work is justly regarded as the author of the mischief resulting from it, whether he does the work himself or lets it out by contract.' " (Emphasis ours.)

In other words, the defendant is not ordinarily liable for negligence of an independent contractor or his employees, the exception being where the contract *directly* requires performance of work intrinsically dangerous, "HOWEVER SKILLFULLY PERFORMED." And here petitioner's own theory of the case negatives the applicability of this exception, because petitioner contends that the dynamiting could be carried on safely by the exercise of ordinary care on the part of the independent contractor and his employees. (R. p. 2-9.)

The contract here involved did not expressly require the use of dynamite, in that the contractor was free to use his own means and methods in digging the ditch, and respondent was interested only in the final result; but if it be considered that the contract contemplated the use of dynamite by the contractor, nevertheless this did not make performance of the contract intrinsically dangerous.

It is true that some cases have held that contracts requiring blasting are inherently dangerous, but an examination of these cases shows that they come within the rule of CAMERON MILL & ELEVATOR COMPANY v. ANDERSON, in that the contract directly required the performance of a work intrinsically dangerous, however skillfully performed, such as blasting in an inhabited region, or public highway, where damage to third parties or property could be anticipated from the shock or falling stones (CISCO & N. E. RY. CO. v. PIPELINE COMPANY, 240 S.W. 990 (cited by petitioner).

The rule applicable to this case is well stated in 19 TEXAS JURISPRUDENCE, Section 11, page 467:

> "As to explosions set off by an independent contractor, it has been said that ordinary blasting operations in themselves are not considered so intrinsically dangerous as to render the employer liable for the contractor's negligent acts; that is, the employer is not liable by reason of the act of employing a contractor to do the work; there is not imposed upon him the absolute duty to take special precautions to avoid injuries from the contractor's operations. However, the rule absolving the employer from liability for injury resulting from the blasting operations does not obtain where the work is intrinsically and inherently dangerous *even though skillfully performed*, the case being brought within the exception to the general rule exempting a principal from liability for the consequences of the work done by an independent contractor. In such case both the employer and the independent contractor are liable to one whose property has been injured whether the contractor's act was done negligently or otherwise." (Italics ours.)

Again in KENDALL v. JOHNSON (Wash. Sup.), 99 Pac. 310:

> "The work of blasting may or may not fall within the exceptions to the general rule, according to the particular circumstances of the individual case; but under the facts here presented, where the parties were employed to construct a railroad grade in the Cascade Mountains, far removed from any human habitation, we think the general rule of nonliability applies."

Again, in 14 RULING CASE LAW, Section 31, page 99:

> "The mere fact that work which is the subject of a contract requires blasting will not, ipso facto, render the employer liable upon the theory that the work con-

tracted for is a nuisance or is intrinsically dangerous. * * * BLASTING IN THE CONSTRUCTION OF A WAGON ROAD THROUGH AN UNINHABITED AND CONSTANTLY UNTRAVELED AND WILD MOUNTAIN REGION IS NOT NECESSARILY A DANGEROUS WORK OR A NUISANCE." (Emphasis ours.)

Please recall that the pipeline here was being constructed through "barren lands."

The exact point has heretofore been decided in Texas in a case, just as ours, involving pipeline construction, namely, LONE STAR GAS COMPANY v. KELLY, 46 S.W. (2d) 656 (Tex. Com. App.). There, as here, the defense was that the pipeline was being laid by independent contractor. There, as here, plaintiff's counsel contended that the work involved was intrinsically dangerous. There the Court held:

"Counsel for Kelly contend that the undertaking here involved was so intrinsically dangerous within itself that the Lone Star Gas Company could not legally delegate to another the right to perform it, and thereby relieve itself from liability. We see nothing so intrinsically dangerous in this work as would render it unlawful for the gas company to contract for it to be done by an independent contractor."

In DIBERT v. GIEBISCH, 144 Pac. 1184, the Court stated:

"These two exceptions to the rule adverted to are not thought to be involved herein, since it is believed that the work of blasting stumps is not essentially dangerous *when proper care is exercised*. Nor does such work in a sparsely settled community necessarily create a nuisance, but it may be, and often is, dangerous by reason of the negligent use of the high explosives employed to clear land." (Italics ours.)

In JOSEPH R. FORD v. MARYLAND, 219 Fed. 827, the Court held that work in loading a steamship with dynamite was not inherently dangerous, within the meaning of the rule rendering the employer liable for injuries to third parties; quoting from that opinion:

> "It was not disputed that dynamite may be loaded with perfect safety if adequate care be taken against concussion and heat. There was no danger of either except from the details of the work, and therefore the independent contractor alone was liable."

In DAYTON v. FREE (Utah Sup.), 148 Pac. 408, plaintiff was drilling holes for blasting and struck an unexploded charge of dynamite, and there the Court held the work was not intrinsically dangerous, stating:

> "Here the stipulated work itself, constructing and developing the tunnel, did not involve injurious or mischievous consequences to others. And the injury to plaintiff was not caused from the act of performance, but from the manner of performance over which, as has been seen, the company neither reserved nor exercised direction, control, or supervision. We think, therefore, that the case comes within the general rule that when a person employs a contractor to do work lawful in itself and involving no injurious consequences to others, and damage arises to another through the negligence of the contractor or his servants, the contractor, and not the employer, is liable. We think the ruling right."

WHITE v. MCGEE (Okla. Sup.), 11 Pac. (2d) 924, is closely in point. There plaintiff alleged that decedent was in the employ of defendants and defendants ordered decedent to do blasting and shooting of dynamite in laying a pipeline; that decedent was inexperienced in the use of dynamite, and while so employed explosion occurred, resulting in his death.

Defendants' Marland Companies defended on the grounds that McGee was independent contractor laying the pipeline. There the Supreme Court of Oklahoma stated:

> "An examination of the evidence shows that the defendant Reece E. McGee was an independent contractor laying the pipe in question for the Marland Companies; that he hired the men, including the decedent, and discharged them; that the manner and method of doing the work was left entirely to him; that the Marland Companies paid him for the work on the basis of 22-½ cents per lineal foot; that the Marland Companies had a representative on the job to see that the ditch was dug to a certain depth according to the specifications; that said companies had no supervisory control over the employees, machinery, or tools with which the work was performed; that the defendant McGee exercised his own judgment with reference to the method and manner of doing the work; that the Marland Companies were only interested in seeing that the result of the work was in accordance with their plans and specifications. A review of this record removed any question of doubt as to the correctness of the sustaining of the demurrers to the evidence interposed by the Marland Companies" (p. 926).

SEISMIC EXPLORATIONS v. DOBRAY, 169 S.W. (2d) 739, cited by petitioner, does not hold differently from the Circuit Court, but for a different reason (size of the dynamite) holds dynamiting there was not inherently dangerous, and reaffirms 19 TEX. JUR., page 467, cited here and by the Circuit Court.

LOYD v. HERRINGTON, 178 S.W. (2d) 700 (Tex. Civ. App.), cited by petitioner, was reversed by the Texas Supreme Court in an opinion reported in 182 S.W. (2d) 1003, and we do not construe the opinion of the Supreme Court in that case to hold that all dynamiting is inherently danger-

ous; in fact, there was no reason for the Court there to pass on that point, because it disposes of the case on the well settled principle of law quoted by the Circuit Court in our case (R. p. 168): "No recovery may be allowed from an injury resulting from an act or fault purely collateral to the work and which arises entirely from the wrongful act of the independent contractor or his employees."

We submit that the Circuit Court correctly held that the work here was not intrinsically dangerous, if skillfully performed.

2. Whether or not the contract called for inherently dangerous work, respondent is not liable, because petitioner's injury did not result directly from the performance of the contract, but resulted solely from collateral negligence of the independent contractor or his employees.

LOYD v. HERRINGTON (Texas Sup.), 182 S.W. 1003, cited and quoted by the Circuit Court (R. 168), is direct authority for the proposition above stated, and we respectfully refer this Honorable Court to the opinion of the Texas Supreme Court in that case.

The law does not impose liability on the employer of independent contractor for every accident arising out of the performance of inherently dangerous work by the independent contractor. This is correctly held by the Texas Supreme Court in LOYD v. HERRINGTON, and in many other cases.

In CAMERON MILL & ELEVATOR CO. v. ANDERSON (Tex. Ct. Civ. App.), 78 S.W. 8, affirmed (Tex. Sup.), 81 S.W. 282, the Court of Civil Appeals quotes LORD COCKBURN as saying:

> "The danger arose directly from the work which they required to be done, and not from the negligent manner of its performance" (78 S.W. p. 9).

That is the point upon which the Court based the exception to the general rule of nonliability of an employer for negligence of an independent contractor.

In ROBBINS v. CHICAGO, 4 Wall. 657, 18 L. Ed. 432, this Honorable Court tersely announced the rule of exemption and its exception in the following language:

> "Where the obstruction or defect caused or created in the street is *purely collateral* to the work contracted to be done, *and is entirely the result of the wrongful acts of the contractor or his workmen, the rule is that the employer is not liable;* but where the obstruction or defect which occasioned the injury results directly from the acts which the contractor agrees and is authorized to do, the person who employs the contractor and authorizes him to do those acts is equally liable to the injured party." (Italics ours.)

The same distinction is pointed out in MISSOURI VALLEY BRIDGE & IRON CO. v. BALLARD, 116 S.W. 93 (Tex. Civ. App.); and in SMITH v. HUMPHREYVILLE, 104 S.W. 495 (Tex. Civ. App., writ denied); and in EVANS v. BRYANT, 29 S.W. 484 (Tex. Civ. App., writ denied).

The Missouri case of SALMON v. KANSAS CITY, 145 S.W. 16, cites with approval the Texas case of MISSOURI VALLEY IRON & BRIDGE COMPANY v. BALLARD, and holds:

> " * * * The drilling of a hole for a charge of dynamite is certainly not an inherently dangerous task. The negligence of the foreman, which it is charged was the immediate cause of the injury, was not the natural and obvious result of blasting; * * * The plaintiff was not injured in the proper execution of the work, but solely

> by reason of the negligent manner in which it was performed, i.e., the negligent failure to detect the unexploded charge * * * " (p. 23).

These cases distinguish between consequences flowing directly and necessarily from the performance of the contract and consequences resulting from the negligent manner in which the contract was performed by the independent contractor or his employees, and under this settled Texas law respondent is not liable.

3. The rule permitting third parties to recover against the contractee for consequences directly resulting from the performance of contract calling for inherently dangerous work does not enure to the benefit of the employee of the independent contractor: Hence, petitioner cannot recover in any event.

The proposition above stated is well expressed in 14 R. C. L., page 95, as follows:

> "The rule imposing liability on the employer is for the protection of third persons, not for the protection of the contractor's servants, and the latter cannot hold the employer responsible for the contractor's negligence in blasting in a municipal street solely upon the theory that the work was a nuisance or was intrinsically dangerous."

We deduce the same rule from the Texas decisions following:

> Simonton v. Perry (Tex. Ct. Civ. App.), 62 S.W. 1909, writ refused;
> Humble Oil & Refg. Co. v. Bell (Tex. Civ. App.), 180 S.W. (2d) 970, affd. by Tex. Sup. Ct. on other grounds, 181 S.W. (2d) 569.

In CUNNINGHAM v. RAILWAY COMPANY, 51 Tex. 503, the Texas Supreme Court held that the employer or contractee was not liable for the acts of the independent contractor, on the ground that liability should be commensurate to the extent only of right to control.

Under the contract in this case, as well as a matter of law, respondent had no control over the independent contractor or his employees in the manner, means and methods of doing the work, and the independent contractor was responsible to respondent only for the finished product.

We respectfully submit that the Circuit Court properly decided this case in conformity with Texas law, and that petition for writ of certiorari should be denied, and respondent so prays.

Respectfully submitted,

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